

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

7 JAMES WIGGINS, III,) 2:11-cv-01815-ECR-VCF
8 Plaintiff,)
9) **Order**
10 vs.)
11 COSMOPOLITAN CASINO OF LAS VEGAS,)
12 Defendant.)

14 This case arises out of allegations that Plaintiff was wrongfully
15 terminated. Now pending before the Court is Defendant's Motion to
16 Dismiss (#8). The motion is ripe and we now rule on it.

I. Background

19 The Complaint (#5) alleges that Plaintiff, while employed by
20 Defendant, was subjected to harassment and verbal abuse by his co-
21 workers. (Compl. at 1 (#5).) Plaintiff further alleges that his co-
22 workers insulted him in Spanish and threw dishes at his head. (*Id.* at
23 2.) Plaintiff claims he was terminated from his employment because
24 his other coworkers falsely accused him of making a racial remark.
25 (*Id.* at 8-9.)

26 On July 8, 2011, Plaintiff filed a charge of discrimination with
27 the EEOC, alleging that Defendant discriminated against him on the
28

1 basis of race, color, sex, age, disability, and in retaliation in
 2 violation of Title VII, the Americans with Disability Act ("ADA") and
 3 the Age Discrimination in Employment Act ("ADEA"). (Id. at 12.)¹ The
 4 EEOC issued a right to sue letter on August 5, 2011. (Id. at 10.)
 5 Plaintiff subsequently filed a motion/application for leave to
 6 proceed in forma pauperis (#1), with attached complaint, on November
 7 10, 2011. On November 18, 2011, we granted (#4) Plaintiff in forma
 8 pauperis status and ordered the clerk to file the complaint. The
 9 Complaint (#5) was filed on November 18, 2011.

10 On January 27, 2012, Defendant filed a Motion to Dismiss (#8)
 11 pursuant to Federal Rules of Civil Procedure 12(b)(1), 12(b)(6), and
 12 8. Plaintiff responded (#11) on February 9, 2012, and submitted an
 13 addendum (#12) to the response on February 10, 2012.² Defendant
 14 replied (#13) on February 21, 2012.

15

16

17

18

19 ¹ We consider the documents physically attached to the complaint
 20 without converting the motion to dismiss to a motion for summary
 21 judgment because their "authenticity is not contested" and "the
 22 plaintiff's complaint necessarily relies on them." Lee v. City of Los
23 Angeles, 250 F.3d 668, 668 (9th Cir. 2001).

24 ² Plaintiff filed an additional response (#15) on March 2, 2012.
 25 Local Rule 7-2 outlines timing for motions, responses, and replies,
 26 as noted by the Court in its January 30, 2012 Order (#9) advising
 27 Plaintiff of the consequences of failing to respond to a motion to
 dismiss. Plaintiff did not request the Court's leave to file an
 additional opposition following completion of the briefing on this
 matter. The Court therefore strikes Plaintiff's additional response
 (#15). The Court admonishes Plaintiff to refrain from filing
 excessive or duplicative briefing outside of the scope of permissible
 court filings noted in the Local Rules and the Federal Rules of Civil
 Procedure.

28

II. Legal Standard

2 A. Federal Rule of Civil Procedure 12(b) (1)

3 A rule 12(b)(1) motion to dismiss for lack of subject matter
4 jurisdiction may be made in two ways, either as a facial or a factual
5 challenge to the existence of federal jurisdiction. White v. Lee, 227
6 F.3d 1214, 1242 (9th Cir. 2000). A facial challenge asserts that the
7 pleadings are insufficient to support subject matter jurisdiction.
8 Safe Air for Everyone v. Meyer, 373 F.3d 1035, 1039 (9th Cir. 2004).
9 A factual challenge asserts that there is no actual existence of
10 jurisdiction. Id. When a party makes a facial challenge, the court
11 must accept the allegations of the pleadings as true. Id. However,
12 when a party makes a factual challenge, the court is not required to
13 presume the truth of the allegations and may consider other properly
14 presented evidence in the record for the purposes of determining the
15 existence of subject matter jurisdiction. Id. The party who asserts
16 that the court has subject matter jurisdiction has the burden to prove
17 such jurisdiction. In re Dynamic Random Access Memory (DRAM)
18 Antitrust Litig.

19 B. Federal Rule of Civil Procedure 12(b) (6)

20 Federal Rule of Civil Procedure 8(a)(2) requires only "a short
21 plain statement of the claim showing that the pleader is entitled
22 relief" in order to "give the defendant fair notice of what the . . .
23 claim is and the grounds upon which it rests." Conley v. Gibson, 255
24 U.S. 41, 47 (1957). Federal Rule of Civil Procedure 12(b)(6) mandates
25 that a court dismiss a cause of action that fails to state a claim
26 upon which relief can be granted. A motion to dismiss under 12(b)(6)

1 tests the complaint's sufficiency. See N. Star Int'l v. Ariz. Corp. Comm'n, 720 F.2d 578, 581 (9th Cir. 1983). When considering a motion
 2 to dismiss under Rule 12(b) (6) for failure to state a claim, dismissal
 3 is appropriate only when the complaint does not give the defendant
 4 fair notice of a legally cognizable claim and the grounds on which it
 5 rests. See Bell Atl. v. Twombly, 550 U.S. 544, 555 (2007). In
 6 considering whether the complaint is sufficient to state a claim, the
 7 court will take all material allegations as true and construe them in
 8 the light most favorable to the plaintiff. See NL Indus., Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986). The court, however, is not
 9 required to accept as true allegations that are merely conclusory,
 10 unwarranted deductions of fact, or unreasonable inferences. See Sprewell v. Golden State Warriors, 266 F.3d 979, 988 (9th Cir. 2001).
 11 A formulaic recitation of a cause of action with conclusory
 12 allegations is not sufficient; a plaintiff must plead facts showing
 13 that a violation is plausible, not just possible. Ashcroft v. Iqbal,
 14 129 S.Ct. 1937, 1949 (2009) (citing Twombly, 550 U.S. at 555).
 15

16 "Generally, a district court may not consider any material beyond
 17 the pleadings in ruling on a 12(b) (6) motion. However, material which
 18 is properly submitted as part of the complaint may be considered on a
 19 motion to dismiss." Hal Roach Studios, Inc. v. Richard Feiner & Co.,
 20 896 F.2d 1542, 1555 n.19 (9th Cir. 1990) (citation omitted).
 21 Similarly, "documents whose contents are alleged in a complaint and
 22 whose authenticity no party questions, but which are not physically
 23 attached to the pleading, may be considered in ruling on a Rule
 24 12(b) (6) motion to dismiss" without converting the motion to dismiss
 25
 26
 27

1 into a motion for summary judgment. Branch v. Tunnell, 14 F.3d 449,
 2 454 (9th Cir. 1994). Moreover, under Federal Rule of Evidence 201, a
 3 court may take judicial notice of "matters of public record." Mack v.
 4 S. Bay Beer Distrib., Inc., 798 F.2d 1279, 1282 (9th Cir. 1986).
 5 Otherwise, if the district court considers materials outside of the
 6 pleadings, the motion to dismiss is converted into a motion for
 7 summary judgment. See Arpin v. Santa Clara Valley Transp. Agency, 261
 8 F.3d 912, 925 (9th Cir. 2001).

9 **C. Federal Rule of Civil Procedure 8**

10 Under Rule 8, the plaintiff must submit a "short and plain
 11 statement of the claim showing the pleader is entitled to relief." A
 12 complaint violates Rule 8 if it is so "verbose, confused and redundant
 13 that its true substance, if any, is well disguised." Hearns v. San
 14 Bernadino Police Dept., 530 F.3d 1124, 1131 (9th Cir. 2008) (quoting
 15 Corcoran v. Yorty, 347 F.2d 222, 223 (9th Cir. 1965)). A complaint
 16 must clearly and concisely state which defendants are liable for which
 17 wrongs based on which facts. McHenry v. Renne, 84 F.3d 1172, 1178
 18 (9th Cir. 1996). However, "verbosity or length is not by itself a
 19 basis for dismissing a complaint based on Rule 8(a)." Hearns, 530
 20 F.3d at 1131 (citations omitted).

21

22 **III. Discussion**

23 **A. Motion to Dismiss Plaintiff's Title VII Claims Pursuant to Rule**
 24 **12(b)(1)**

25 Defendant moves to dismiss Plaintiff's Title VII cause of action
 26 pursuant to Rule 12(b)(1) on the basis that the Complaint (#5) is
 27 untimely and the Court therefore lacks subject matter jurisdiction

1 over the claim. Specifically, Defendant contends that Plaintiff
2 failed to file suit within ninety days of receiving his Right to Sue
3 letter from the EEOC as required by Title VII.

4 As noted by Defendant, Title VII requires a plaintiff to file
5 suit within ninety days following the plaintiff's receipt of a right-
6 to-sue letter from the EEOC. See 42 U.S.C. §2000e-5(f)(1). The
7 ninety-day filing deadline is strictly construed, and an action is
8 therefore barred when a Title VII claimant fails to file on time.
9 Scholar v. Pac. Bell, 963 F.2d 264, 267-68 (9th Cir. 1992) (dismissing
10 a Title VII claim filed two days after the ninety-day deadline).

11 Plaintiff's right-to-sue letter was mailed on August 5, 2011.
12 However, the ninety-day period begins to run upon a claimant's receipt
13 of the letter. See id. at 267 n.2 ("[T]he 90-day period begins to run
14 when claimant receives the right-to-sue letter rather than when the
15 letter is dispatched."). In this case, the only evidence of when the
16 letter was actually received is Plaintiff's apparent notation next to
17 the section on the right-to-sue letter, which Plaintiff attached to
18 the Complaint, explaining the ninety-day deadline and advising
19 Plaintiff to keep a record of his receipt date, indicating that he
20 received the letter on August 13, 2011. (See Compl. (#5) at 11.)
21 Defendant has put forth no other evidence of the receipt date. We
22 therefore find that Plaintiff received the right-to-sue letter on
23 August 13, 2011, thereby starting the ninety-day clock. We therefore
24 now turn to a computation of time.

25

26

27

28

1 Federal Rule of Civil Procedure 6 provides the rules for
 2 computing time "in any statute that does not specify a method of
 3 counting time." FED. R. CIV. P. 6(a).

4 When the period is stated in days or a longer unit of time:
 5 (A) exclude the day of the event that triggers the
 6 period;
 7 (B) count every day, including intermediate Saturdays,
 8 Sundays, and legal holidays; and
 9 (C) include the last day of the period, but if the
 10 last day is a Saturday, Sunday, or legal holiday,
 11 the period continues to run until the end of the
 12 next day that is not a Saturday, Sunday, or legal
 13 holiday.

14 FED. R. CIV. P. 6(a)(1). Accordingly, we therefore take judicial notice
 15 of the 2011 calendar, and, using the start date of August 13, 2011 and
 16 the method prescribed by Rule 6, find that Plaintiff's deadline to
 17 file suit fell on November 14, 2011 because the ninetieth day,
 18 November 11, was a Friday and a Veterans Day, a federal legal holiday.

19 Defendant, somewhat disingenuously, argues that Plaintiff missed
 20 the deadline because the Complaint (#5) was not filed until November
 21 18, 2011. While this is technically the case, Plaintiff actually
 22 instituted the suit by filing a motion/application for leave to
 23 proceed in forma pauperis (#1), with the complaint attached, on
 24 November 10, 2011. We therefore find that Plaintiff timely filed suit
 25 and has carried the burden of proving jurisdiction. Defendant's
 26 12(b)(1) motion to dismiss Plaintiff's Title VII claim for lack of
 27 subject matter jurisdiction must be denied.

28 **B. Motion to Dismiss Plaintiff's § 1983 Claim Pursuant to Rule
 29 12(b)(6)**

30 Defendant moves to dismiss Plaintiff's section 1983 claim
 31 pursuant to Rule 12(b)(6) for failure to state a claim upon which
 32
 33

1 relief can be granted. Specifically, Defendant argues that
2 Plaintiff's claim fails to allege state action.

3 "[Title] 42 U.S.C. § 1983 provides a remedy to individuals whose
4 constitutional rights have been violated by persons acting under color
5 of state law." Burke v. Cnty. of Alameda, 586 F.3d 725, 731 (9th Cir.
6 2009) (quoting Caballero v. City of Concord, 956 F.2d 204, 206 (9th
7 Cir. 1992)). To sustain an action under § 1983, a plaintiff must
8 prove that (1) the defendant acted under color of state law; and (2)
9 the conduct deprived the plaintiff of a right secured by the
10 Constitution or laws of the United States. See Johnson v. Knowles,
11 113 F.3d 1114, 1117 (9th Cir. 1997).

12 Plaintiff has not alleged that Defendant acted under color of
13 state law, nor has Plaintiff otherwise alleged any state action in the
14 Complaint. Rather, Plaintiff seeks to sue his former employer, a
15 private actor, for his termination and for a hostile work environment.
16 Accordingly, Plaintiff's section 1983 claim fails as a matter of law
17 and must be dismissed.

18 **C. Motion to Dismiss the Complaint Pursuant to Rule 8**

19 The Court agrees with Defendant that, while Plaintiff's
20 allegations are fairly clear, it is unclear which causes of action
21 Plaintiff seeks to assert. "No peace on the job," "dish throwing and
22 name calling," and "selective slavery" are not recognized causes of
23 action. However, the Complaint (#5) can fairly be read to include a
24 Title VII hostile work environment claim, a state law wrongful
25 termination claim, and a state law negligent hiring claim.
26 Furthermore, the EEOC filings attached to the complaint also seem to
27

1 assert age discrimination, disability discrimination, and retaliation
2 claims. If Plaintiff wishes to include these causes of action or any
3 others, he may do so in an amended complaint, as Defendant is entitled
4 to know which claims it must defend against. Should Plaintiff choose
5 to amend, he is advised to properly label his causes of action, and
6 include the facts, in a short plain statement, that support each cause
7 of action, whether it be a Title VII hostile work environment claim,
8 an age discrimination claim, a wrongful termination claim, or any
9 other asserted cause of action.

10

11 **IV. Conclusion**

12 Plaintiff's Title VII claim was timely filed in this Court, and
13 this Court therefore has subject matter jurisdiction over the claim.
14 Plaintiff's section 1983 claim alleges no state action and must
15 therefore be dismissed. Finally, because Plaintiff's remaining legal
16 claims are largely indecipherable, Plaintiff's Complaint (#5) will be
17 dismissed, but with leave to amend. Plaintiff is advised that his
18 case may be dismissed if he fails to file an amended complaint within
19 the time allowed by the Court.

20

21 **IT IS, THEREFORE, HEREBY ORDERED** that Defendant's Motion to
22 Dismiss (#8) pursuant to Rule 8 is **GRANTED**.

23 **IT IS FURTHER ORDERED** that Plaintiff shall have twenty-eight (28)
24 days within which to file an amended complaint stating proper causes
25 of action.

26

27

28

